

**Local Union No. 76 of the International Brotherhood of Electrical Workers, AFL-CIO and Gaylord Broadcasting Co., d/b/a KSTW-TV.
Case 19-CC-1527**

3 November 1983

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 11 July 1983 Administrative Law Judge Earledean V.S. Robbins issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Local Union No. 76 of the International Brotherhood of Electrical Workers, AFL-CIO, Tacoma, Washington, its officers, agents, and representatives, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

¹ At sec. III, par. 1, of her decision, the judge inadvertently began her first sentence with "Respondent" instead of "KSTW."

APPENDIX

NOTICE

**POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

**TO ALL MEMBERS OF LOCAL UNION NO. 76 OF
THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO:**

**TO ALL EMPLOYEES OF GAYLORD BROADCASTING
CO., D/B/A KSTW-TV, AND GORDON KORSMO
CONSTRUCTION COMPANY:**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT, nor will our officers, business representatives, business agents, or anyone acting for us, whatever his title may be, engage in, or

induce or encourage any individual employed by Gordon Korsmo Construction Company, or any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require that person, or any other person, to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with Gaylord Broadcasting Co., d/b/a KSTW-TV.

WE WILL NOT threaten, coerce, or restrain Gordon Korsmo Construction Company, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require said person to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, Gaylord Broadcasting Co., d/b/a KSTW-TV, or any other person.

LOCAL UNION NO. 76 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

DECISION

STATEMENT OF THE CASE

EARLDEAN V.S. ROBBINS, Administrative Law Judge: This case was tried before me in Seattle, Washington, on May 17, 1983. The charge was filed by Gaylord Broadcasting Co., d/b/a KSTW-TV, herein called KSTW, and served on Local Union No. 76 of the International Brotherhood of Electrical Workers, AFL-CIO, herein called the Respondent, on February 25, 1983. The complaint, which issued on March 9, 1983, alleges that the Respondent violated Section 8(b)(4)(i) and (ii)(B) of National Labor Relations Act, as herein called the Act. The basic issue herein is whether the Respondent unlawfully picketed a gate reserved exclusively for a neutral contractor.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

KSTW is engaged in the operation of a television station in Tacoma, Washington. In the course and conduct of said business operations, KSTW annually receives gross revenue in excess of \$100,000, and annually sells commercial broadcasting time to advertisers located outside the State of Washington valued in excess of \$50,000 and makes annual purchases from directly outside the State of Washington of a total value in excess of \$50,000.

The complaint alleges and, based on the foregoing, I find that KSTW is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Respondent is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent conducts its operations out of a facility in Tacoma, Washington. At the times material herein, Gordon Korsmo Construction Company, herein called Korsmo, has been engaged in the construction of a structural addition to this facility which involves no KSTW employees and causes no interruption in KSTW's day-to-day operations. On November 2, 1982, some of KSTW's employees went out on strike and commenced picketing the facility which immediately halted construction. Thereafter KSTW attempted to set up a neutral gate by reserving one of its two entrances¹ for the exclusive use of the neutral contractor. The attempt was successful as there was no physical barrier to prevent employees, job applicants, and visitors from walking across the lawn to use the other entrance.

To remedy this problem, about 2 weeks after the picketing commenced, KSTW placed a 6-foot chain-link fence from the east end of the building along Trafton Street and down 19th Street to about the center of the building and employed a guard service. The Trafton Street entrance was set up as the neutral gate and the 19th Street entrance as the primary gate. There was no actual gate at the 19th Street entrance; however, at the Trafton Street entrance there was a gate which was kept chained at all times. The guards posted at this gate were instructed to permit the entry of only the employees, suppliers, and visitors of the neutral construction contractors, a list of which was furnished to the guards by KSTW.

Picketing ceased at the Trafton Street entrance shortly after the establishment of the neutral gate at that entrance and there is no evidence that this gate was used by other than the neutrals from the time of its establishment to February 24, 1983.² Picketing resumed at the Trafton Street entrances on February 25 following what the Respondent contends was the destruction of the neutrality of the gate. The incident alleged as tainting the gate involved the February 24 removal of a garbage dumpster. It is undisputed that a garbage dumpster had been in place at the KSTW facility prior to the commencement of the building construction work. The normal debris which accumulated in the course of KSTW's operations was placed in the dumpster on a daily basis and about once every month or two, when the dumpster was full, employees from the city of Tacoma disposal unit entered the KSTW premises, re-

moved the full dumpster, and replaced it with an empty one.

According to Curtis M. Holman, KSTW business manager, after the commencement of the construction work, construction debris was placed in this dumpster as well as the normal debris from the operation of KSTW so that the dumpster had to be removed about every 2 weeks. Following the commencement of the picketing in November 1982, city employees refused to cross the picket line. Upon the insistence of KSTW, a routine was established whereby the city driver would bring this equipment to a location about a block away from the KSTW facility where he would be met by a supervisor from the city of Tacoma disposal unit who would then drive the equipment onto the KSTW premises, remove the full dumpster to the location where the city driver was waiting, and the city driver would then haul the dumpster away.

John Thompson, the guard on duty at the neutral gate on February 25, testified that it was his responsibility to allow only traffic for Korsmo and its subcontractors through the neutral gate. The procedure followed by the guards is to log, for each person permitted access through the neutral gate, the license number of the vehicle, the time of entry, whether the person is an employee of, or has business with, Korsmo or a subcontractor of Korsmo, and the exit time. The guard always physically opens the gate for entries and exits. According to Thompson, on February 24 when the city of Tacoma garbage truck approached the neutral gate shortly before noon, he told the driver that he was to use the 19th Street gate. The driver said the Union told him to use the Trafton Street gate so he opened the gate and permitted the garbage truck to enter. About 5 or 10 minutes later, the garbage truck exited through the Trafton Street gate hauling a dumpster. Thompson admits that the city of Tacoma garbage truck was not on the list of vehicles permitted to enter through the Trafton Street gate. However, according to him, the truck had a big metal dumpster on the back of it that appeared to be large enough for construction use, so when the driver explained that the Union had told him to use the Trafton Street gate he assumed he was referring to a construction union. Thompson admits that he did not inquire as to which union but merely accepted the driver's explanation.

Miles Forrester, the guard on duty at the Trafton Street gate from 12:01 until 8 a.m. on February 25, testified that shortly before 6 a.m. that day he was approached by some union picketers who stated that the Trafton Street gate had been contaminated and they commenced picketing at that gate. Holman testified that when he arrived at work shortly before 8 a.m. there were close to a dozen picketers at the Trafton gate and a number of balloons around the fence. The construction workers refused to cross the picket line, so all construction work was halted. Holman immediately began investigating as to what had precipitated the resumption of picketing at the Trafton Street gate. Upon learning of the garbage truck incident, he requested that the guard service remove Thompson from any further duties at the KSTW facility because of his error in judgment regard-

¹ There is a third entrance at the rear of the building which is not normally kept open.

² All dates hereinafter will be in 1983 unless otherwise indicated.

ing the entry of the garbage truck. Holman then took further steps to ensure the neutrality of the gate. The instructions to the guards were restated and again emphasized and the owner of the guard service was contacted and again informed of the importance of maintaining the neutrality of the Trafton Street gate.

Additionally, a letter dated February 25 was hand-delivered that day to union business representative William B. Zenk, the body of which reads:

Gentlemen:

This is to notify you, as representatives of I.B.E.W. Local No. 76, that the use of the construction gate on the East side of the KSTW property of Trafton Street will continue to be restricted as designated for the exclusive use of Gordon Korsmo Construction Company and its employees, agents, visitors and suppliers. In view of this notice, we demanded that you immediately cease your picketing of this gate, which commenced on February 25, 1983 at 7:30 am. If you continue to picket the gate after receipt of this letter, charges will be filed with the National Labor Relations Board and we will commence legal action to recover damages sustained by the illegal picketing.

If it is your contention that the picketing of the reserved gate is "justified" because a City of Tacoma dump truck used the gate on February 24, be advised that the City vehicle entered the property for the purpose of removing scrap from the construction site.

It is our position that the incident described above does not justify your picketing of the reserved gate. Further, picketing the construction gate is in violation of the terms of the settlement agreement of National Labor Relations Board Case No. 19-CC-1518, in which Local No. 76 promises that it would not picket the gate. In any event, please consider this letter as our notice to you that the integrity of the reserved gate will be maintained, and that our guards at the gate have been instructed that it be used only by Gordon Korsmo Construction Company and its employees, agents, visitors and suppliers.

We trust that your pickets will immediately be removed from the gate and that further legal action will not be necessary.

An attempt was made to deliver the same letter to picket captain Gary Kolano. However, Kolano refused to accept the letter so Holman just shoved it under the fence. This occurred prior to noon on February 25. Nevertheless the picketing continued at the Trafton Street gate until mid-April when KSTW obtained a court order enjoining the picketing. Construction work did not recommence until about the first of May. As a result of the delay in the construction work, KSTW was required to renegotiate its contract with Korsmo at an increased cost of approximately \$58,000. This increase in cost was necessitated by Korsmo's need to rehire and retrain foremen and employees and the cost of renting scaffolding and other equipment. There is no evidence on the record

that the Trafton Street gate has been misused since February 24 nor has the Union complained to KSTW of any misuse of the gate.

KSTW notified the Union of the reestablishment of the neutral Trafton Street gate by letter dated November 18, 1982, the body of which reads:

This is to notify you, as representatives of IBEW Local No. 76, that Gordon Korsmo Construction Co., as of this date, 12:00 noon, has reestablished a construction gate on the east side of the KSTW-TV property on Trafton Street for the exclusive use of employees, subcontractors, suppliers, visitors or agents who are performing work or providing services at our facility located at 2320 So. 19th Tacoma, WA.

This gate is designated by a sign that states: Entrance #2 (Construction Gate). This entrance reserved for the exclusive use of Gordon Construction Company and its employees, suppliers, business visitors and subcontractors. All other persons must use the entrance on the North Side of the property on South 19th Street.

We have re-established and posted the gate at the entrance on the north side of the KSTW-TV property on 19th Street as the entrance to our premises for the exclusive use of employees, suppliers, agents and visitors of KSTW-TV.

This entrance is designated by a sign that states: Entrance #1 (KSTW-TV). This entrance reserved for the exclusive use of employees, suppliers, and business visitors of KSTW-TV. Employees, suppliers, business visitors, and subcontractors of Gordon Korsmo Construction Company must use the entrance on the east side of the property on Trafton Street and may not use this entrance.

This is to further notify you that the construction gate will not be used by anyone involved in the present labor dispute with your union. In order to ensure that the reserve gate is restricted for the exclusive use of neutral employees, we have taken the following precautions:

1. We have erected a 6-foot fence from the north-east corner of the building extending eastward of the building approximately 20 feet, and then to the corner of 19th & Trafton Street, and then up 19th Street to the approximate center of the KSTW-TV Building.
2. Across the Trafton Street entrance will be a construction gate made of chain link fencing, which will be attended by a security guard between the hours of 6:00 am and 6:00 pm to ensure that it is not used by employees, suppliers or business visitors of KSTW-TV. The gate will be locked and secured between 6:00 pm and 6:00 am and over the weekends, to ensure that it is not used during those hours.
3. All employees of KSTW-TV have been advised via letter to observe the gate signs and have been

informed that they must not use the construction gate in entering or exiting the property. We hereby request that, should you at any time have information that the construction entrance has been used in a manner contrary to the posted sign, please notify us immediately so that appropriate, corrective action can be taken.

We trust that, based on the above, you will immediately remove your pickets from the vicinity of the construction gate on Trafton Street and the fenced area adjacent to it on Trafton Street and So. 19th. Failure to immediately remove the pickets from the vicinity of the construction gate will result in the filing of unfair labor practice charges with the National Labor Relations Board charging your union with engaging in illegal secondary boycotting. In addition, a lawsuit will be filed in the Federal District Court.

The evidence indicates that the gates were posted, the Trafton Street gate attended and secured, and the employees advised, as indicated in the letter.

The Respondent contends that there have been "frequent and continuing flagrant violations of the neutral gate from the outset of the picketing," and that the gate was rehabilitated several times prior to the February 24 violation. In support thereof, the Union adduced evidence as to violations of the neutrality of the Trafton Street gate between its initial establishment on November 3, 1982, and the erection of the chain-link fence on about November 17, 1982.³

Conclusions

Section 8(b)(4)(B) of the National Labor Relations Act provides that it shall be an unfair labor practice for a labor organization:

... to engage in, or to induce or encourage [the employees of any employer] to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or ... to threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is:

... forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9:

Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

This section is designed to permit union sanctions aimed at the primary employer while prohibiting such sanctions which bear "not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it." *Electrical Workers IBEW Local 501 v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950). In distinguishing between legitimate primary activity and banned secondary activity where, as here, a neutral employer is engaged in activity at the premises of the primary employer, the Board and the courts have evolved certain guidelines. Thus in such a situation, the primary employer may limit the location of picketing at its premises by reserving a separate gate for the exclusive use of certain neutral employers where the reserved gate is clearly marked as such and set apart from other gates; and where the work done by the neutral employers at the primary situs is unrelated to the normal operations of the primary employer and is of a kind which would not necessitate the curtailing of the regular operations of the primary employer. If a union pickets at a gate reserved in accordance with these guidelines, an unlawful secondary objective may be inferred. *Electrical Workers v. NLRB*, 366 U.S. 667 (1961). Here, it is undisputed that the Respondent has no dispute with Korsmo, that the Trafton Street gate reserved for Korsmo, its employees, and suppliers was properly posted and that the construction work engaged in by Korsmo at the KSTW facility was neither related to, nor of a kind which would curtail, KSTW's normal operations. However, it is also undisputed that prior to the mid-November 1982 erection of the chain-link fence there was mixed use of the so-called neutral Trafton Street entrance. It is also contradicted that from mid-November 1982 to February 24 the Trafton Street gate was used exclusively by the employees, suppliers, and visitors of Korsmo. The issue here is whether the use of the Trafton Street gate by the city of Tacoma garbage truck constituted such a mixed use of the gate that it cannot be inferred that by picketing the gate, the Respondent had an object of enmeshing Korsmo and its employees and suppliers in the Respondent's dispute with KSTW. The General Counsel argues that, since the evidence indicates that both KSTW and Korsmo used the dumpster for waste disposal, it is not at all clear that removing the dumpster through the Trafton Street gate constituted a pollution of the gate. Further, the General Counsel argues, even assuming, arguendo, that it did, the incident was so insubstantial as to be considered de minimis.

The General Counsel's position is supported by case law. Thus the Board and the courts have consistently held that, where the primary employer has taken reasonable precautions to maintain the neutrality of a reserved gate, the presumption that picketing at that gate is for an unlawful secondary objective is not rebutted by a showing of isolated or de minimis instances of use of the gate by the employees, suppliers, customers and/or visitors of the primary employer. Further, if a reserved gate system

³ The General Counsel's motion is hereby granted to strike that portion of the General Counsel's posthearing brief which refers to incidents which allegedly occurred after the closing of the record herein and the affidavits attached to the brief in support thereof.

breaks down, an employer may establish a revised gate system so long as the revised system is honored and the picketing union is notified of the revision. *Carpenters Local 470 (Mueller-Anderson, Inc.)*, 224 NLRB 315 (1976), enf. 564 F.2d 1360, 1363 (9th Cir. 1977); *Carpenters Local 1622 (Specialty Building Co.)*, 262 NLRB 1244 (1982).

The Respondent argues, however, that the February 24 garbage truck incident, when viewed together with the mixed use of the Trafton Street entrance in early November, must be considered as the most recent of the "frequent and continuing flagrant violations of the neutral gate from the outset of the picketing." In this regard, the Respondent is apparently arguing that each notification to the Union during early November of KSTW's intent to maintain the neutrality of the gate constituted separate attempts to rehabilitate the gate, that the February letter was merely more of the same, and that to allow the employer the right to continually rebuild a "broken gate system" would permit the employer to control the gate system to the detriment of the Union's effort to picket the common situs, thereby extending to the employer rights never intended by Congress or envisioned by the Supreme Court in *General Electric*, supra.

I am persuaded by this argument. It is clear from the record that notwithstanding the positions and the communications to the Union, initially KSTW never took the reasonable precautions to restrict use of the Trafton Street gate to neutrals which would effectively establish a reserved gate system as contemplated in *General Electric*, supra. This was accomplished only upon the erection of the chain-link fence and the institution of the guard service. Thereafter the gate remained untainted until February 24 when, despite his instructions, the guard permitted entry of the garbage truck. Even assuming that this, in fact, constituted a pollution of the gate, KSTW immediately had the guard removed, reemphasized its instruction to the guards and notified the Union of its intent to maintain the neutrality of the gate. In these circumstances, I find that the garbage truck incident did not establish a pattern of destruction of the reserved gate system which would justify picketing at the neutral gate. *Plumbers Local 48 (Calvert General Contractors)*, 249 NLRB 1183 fn. 2 (1980); *Operating Engineers Local 18 (Dodge-Ireland, Inc.)*, 236 NLRB 199, 204 (1978).

Accordingly, I find that an object of the Respondent's picketing on and after February 25 was the unlawful one of forcing the neutral Korsmo to cease doing business with KSTW and is therefore violative of Section 8(b)(4)(i) and (ii)(B) of the Act.

CONCLUSIONS OF LAW

1. Gaylord Broadcasting Co., d/b/a KSTW-TV, is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By picketing on and after February 25, 1983, at a gate reserved solely for Korsmo in furtherance of a dispute with KSTW-TV, the Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act.

4. The foregoing unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Local Union No. 76 of the International Brotherhood of Electrical Workers, AFL-CIO, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act, I shall recommend that it be ordered to cease and desist therefrom and that it take such affirmative action as will effectuate the purposes of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended

ORDER⁴

The Respondent, Local Union No. 76 of the International Brotherhood of Electrical Workers, AFL-CIO, Tacoma, Washington, its officers, agents, and representatives, shall:

1. Cease and desist from

(a) Engaging in or inducing or encouraging any individual employed by Gordon Korsmo Construction Company or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any articles, materials, or commodities, or to refuse to perform any other services where an object thereof is to force or require that person to cease using, handling, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with Gaylord Broadcasting Co., d/b/a KSTW-TV.

(b) Threatening, coercing, or restraining Gordon Korsmo Construction Company or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or to require that person to cease doing business with Gaylord Broadcasting Co., d/b/a KSTW-TV, or any other person.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Furnish to the Regional Director for Region 19 enough signed copies of the aforesaid notice for posting

by Gaylord Broadcasting Co., d/b/a KSTW-TV, if they are willing, in places where notices to their employees are customarily posted.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order what steps the Respondent has taken to comply.